Office - Supreme Court, U. S.
FILED
JAN 3 1944
CHARLES ELMORE CROPLEY
CLERK

No. 209

In the Supreme Court of the United States

OCTOBER TERM, 1943

UNITED STATES OF AMERICA, PETITIONER,

v.

JOHN WATERHOUSE, ERNEST HAY WODEHOUSE, WALTER FRANCIS FREAR and JOHN EDWARD RUSSELL, TRUSTEES UNDER THE WILL AND OF THE ESTATE OF SAMUEL M. DAMON, DECEASED.

ON WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF FOR RESPONDENTS

HERMAN PHLEGER,
A. G. M. ROBERTSON,
Counsel for Respondents.

J. C. PEPPIN,
ROBERTSON & CASTLE,
BROBECK, PHLEGER & HARRISON,
Of Counsel.

PARKER PRINTING COMPANY, 545 SANSOME STREET SAN FRANCISCO

Index

	Page
Questions Presented	1
Statement	4
The two suits	4
The lands	5
The trial	7
Summary of valuations and verdicts	18
Proceedings in Circuit Court of Appeals	19
Summary of Argument	19
Argument	21
Specified Error 1	22
The owners did not contend for subdivided or business values: their claim was only for the then market value having in mind the then demand of the property for subdivision	24
The trial court committed no error in its rulings	26
Proof of market value	41
The evidence complained of was brought out by the Government and its admission is therefore not error	43
Under Hawaiian practice the evidence offered by the owners was admissible	51
No prejudicial error occurred at the trial	54
Specified Error 2	58
Specified Error 3	61
Conclusion	67

Table of Authorities Cited

Pages

CASES

Behrenfeld v. Breedlove, 27 Cal. App. 419, 150 Pac. 71 — 46
Bishop, Estate, Taxes of, 13 Hawaii 671 — 53
Bishop Estate, Re Taxes of, 27 Hawaii 190 — 33, 39, 52
Bond Bros. v. Kay, 223 Ala. 431, 136 So. 817 — 56
Boom Co. v. Patterson, 98 U.S. 403 — 32
Brownell v. Moorehead, 65 Okl. 218, 165 Pac. 408 — 46
Burt v. Wigglesworth, 117 Mass. 302 — 35

Carniot Estate, Re Taxes of, 13 Hawaii 688 — 33, 53
Chatfield v. Board of Revision of Taxes, 346 Pa. 159, 29 A.2d 685 — 34
Chicago, B. & Q. R. Co. v. City of Chicago, 166 U.S. 226 — 42
Chicago, B. & Q. R. Co. v. North Kansas City Devel. Co., 134 F.2d 142 (C.C.A. 8), cert. den. 319 U.S. 771 — 33
Chicago & N. W. Ry. Co. v. Chicago Mechanics Institute, 239 Ill. 197, 87 N.E. 933 — 39
City and County of Denver v. Quick, 108 Colo. 111, 113 P.2d 999 — 38
City of Los Angeles v. Deacon, 119 Cal. App. 491, 7 P.2d 378 — 48, 56
City of Los Angeles v. Hughes, 202 Cal. 731, 262 Pac. 737 — 34
City of New York (Blackwell's Island Bridge), 118 App. Div. 272, 103 N.Y. Supp. 441 — 35
City of Quincy, Assessors of v. Boston Consol. Gas. Co., 309 Mass. 60, 34 N.E.2d 623 — 33, 38
City of Stockton v. Ellingwood, 96 Cal. App. 708, 275 Pac. 228 — 48, 56
Cleveland etc. R. Co. v. Backus, 154 U.S. 439 — 38
Conqueror, The, 166 U.S. 110 — 57
Crystal City R. Co. v. Isbell, 126 S.W. 47 (Tex. Civ. App.) — 42

Dickenson v. Fitchburg, 13 Gray (Mass.) 546 — 36

Egan v. City of Philadelphia, 108 Pa. Super. 271, 164 Atl. 813 — 33
Ewa Plantation Co., Taxes of, 30 Hawaii 775 — 53

Pages

Fidelity & Cas. Co. v. Griner, 44 F.2d 706 (C.C.A. 9) 46, 55
Fidelity & Dep. Co. v. Bates, 76 F.2d 160 (C.C.A. 8) 56

Gearhart v. Clear Spring Water Co., 202 Pa. 292, 51 Atl. 891 ..... 33, 38, 42
General Tire Co. v. Brown Co., 46 Ga. App. 548, 168 S.E. 75 55
Great Northern Ry. Co. v. Weeks, 297 U.S. 135 52
Greenfield v. City of Philadelphia, 282 Pa. 344, 127 Atl. 768 35

Hall v. Delaware, L. & W. R. Co., 262 Pa. 292, 105 Atl. 98 34
Hawaiian Commercial & Sugar Co., Re Taxes of, 26 Hawaii 708 53

Idaho Farm Develop. Co. v. Brackett, 36 Idaho 748, 213 Pac. 696 33

Kansas City & Topeka Ry. Co. v. Splitlog, 45 Kan. 68, 25 Pac. 202 35
Kapiolani Estate, Re Taxes of, 21 Hawaii 667 53
Koopman v. Farmers' Mutual Hail Ins. Assn., 209 Iowa 958, 229 N.W. 221 56

Laureldale Cemetery Co. v. Reading Co., 303 Pa. 315, 154 Atl. 372 34
Lebanon & Nashville Turnpike Co. v. Creveling, 159 Tenn. 147, 17 S.W.2d 22 33
Lincoln v. Commonwealth, 164 Mass. 368, 41 N.E. 489 42
Lomas & Nettleton Co. v. City of Waterbury, 116 Conn. 253, 188 Atl. 433 39
Louisville & N. R. Co. v. Montluzin Co., 166 La. 211, 116 So. 854 34

Massor v. Yates, 137 Ore. 569, 3 P.2d 784 56
McCandless v. United States, 74 F.2d 596 (C.C.A. 9) 37
McCandless v. United States, 298 U.S. 342 ..... 28, 42
Metropolitan Water Dist. v. Adams, 116 P.2d 7 (Cal.) 48
Monongahela Nav. Co. v. United States, 148 U.S. 312 31
Monongahela West Penn. Pub. Serv. Co. v. Monongahela Devel. Co., 101 W.Va. 165, 132 S.E. 380 35

Pages

Morris Plan Co. v. Universal Credit Co., 168 S.W.2d 136 (Mo. App.) 56
Morrow v. Downing, 210 Iowa 1195, 232 N.W. 483 56

National Brick Co. v. United States, 131 F.2d 30 (App. D.C.) 38
Neddermeyer v. Crawford County, 190 Iowa 883, 175 N.W. 339 ..... 48, 57
North American Telegraph Co. v. Northern Pac. Ry. Co., 254 Fed. 417 (C.C.A. 8) 36, 39, 42
Northern Pac. Ry. Co. v. North American Telegraph Co., 230 Fed. 347 (C.C.A. 8), cert. den. 249 U.S. 607 33

Oakland Water Front Co. v. Le Roy, 282 Fed. 385 (C.C.A. 9) 48
Olson v. United States, 292 U.S. 246 ..... 18, 23, 26, 41
Onomea Sugar Co., Re Taxes of, 31 Hawaii 769 53

Pennsylvania S. V. R. Co. v. Cleary, 125 Pa. 442, 17 Atl. 468 34
People v. McReynolds, 31 Cal. App.2d 219, 87 P.2d 734 43
Perazzo v. Ortega, 29 Ariz. 334, 241 Pac. 518 56
Portland & R. R. v. Inhabitants of Deering, 78 Me. 61, 2 Atl. 670 42
Prevette v. United States, 68 F.2d 112 (C.C.A. 4) 55
Pullman Co. v. City of Chicago, 224 Ill. 248, 79 N.E. 572 ..... 35, 36

Ramming Real Estate Co. v. United States, 122 F.2d 892 (C.C.A. 8) 56
Ranck v. City of Cedar Rapids, 134 Iowa 563, 111 N.W. 1027 42
Reed v. Prudential Ins. Co., 229 Mo. App. 90, 73 S.W.2d 1027 46

Sanitary Dist. of Chicago v. Pittsburgh F. W. & C. R. Co., 216 Ill. 575, 75 N.E. 248 33
Schulmeyer's Guardianship v. McAllister, 171 Cal. 340, 153 Pac. 233 46
Smaha v. George, 24 S.E.2d 385 (Ga.) 56
Somers v. Meriden, 119 Conn. 5, 174 Atl. 184 33
State v. Stymer, 58 Idaho 233, 72 P.2d 699 42

Pages

State v. Suffield & Thompsonville Bridge Co., 82 Conn. 460, 74 Atl. 775 33
Stricker v. Scott, 283 Mass. 12, 186 N.E. 45 55
Sullivan v. Missouri, K. & T. R. Co., 29 Tex. Civ. App. 429, 68 S.W. 745 41

Tallman v. Met. El. R. Co., 121 N.Y. 119, 23 N.E. 1134 35
Tax Assessment Appeals, Re, 11 Hawaii 235 53

Union Electric Light & Power Co. v. Snyder Estate Co., 65 F.2d 297 (C.C.A. 8) 42, 57
United States v. Becktold Co., 129 F.2d 473 (C.C.A. 8) 56
United States v. Honolulu Plantation Co., 122 Fed. 581 (C.C.A. 9) 52, 64
United States v. Miller, 319 U.S. 369 ..... 3, 44, 64, 66
United States v. Powelson, 118 F.2d 79 (C.C.A. 4) 42
United States v. Shingle, 91 F.2d 85 (C.C.A. 9), cert. den. 302 U.S. 746 ..... 33, 36

Varner's Exrs. v. White, 149 Va. 177, 140 S.E. 128 56
Vineyard Grove Co. v. Oak Bluffs, 265 Mass. 270, 163 N.E. 888 41

Wadsworth Land Co. v. Piedmont Traction Co., 162 N.C. 503, 78 S.E. 299 35
Waialua Agricultural Co. Ltd. v. Christian, 305 U.S. 91 54
Waialua Agricultural Co., Ltd., Re Taxes of, 30 Hawaii 755 53
Washburn v. Milw. & L. W. Ry. Co., 59 Wis. 364, 18 N.W. 328 57
Welsh v. Tennessee Valley Authority, 108 F.2d 95 (C.C.A. 6) 57
Whaley v. Sloss-Sheffield Steel & Iron Co., 164 Ala. 216, 51 So. 419 57

STATUTES

Act of August 1, 1888, 25 Stat. 357 (40 U.S.C. §§257, 258) 51
Act of May 25, 1939, 53 Stat. 757, 774 62
Act of September 9, 1940, 54 Stat. 717 62

Judicial Code, Sec. 269 (28 U.S.C. §391) 54

Pages

MISCELLANEOUS

1 *Bonbright on Valuation of Property* 415 39

4 *Corpus Juris* 703 §2613 46

5 *Corpus Juris Secondum:*
p. 973-4 56
p. 974-7 56
p. 995 57
p. 996 58
p. 1034 55

29 *Corpus Juris Secondum:*
p. 1261, §273 42
p. 1266 33

32 *Corpus Juris Secondum* 405, §569 57

Model Code of Evidence (Am. L. Inst. 1942) 201 58

2 *Nichols on Eminent Domain* (2d ed. 1917):
p. 1168, §444 42
p. 1172 37

Orgel, Valuation under Eminent Domain (1936):
p. 568 38
p. 570 33
p. 575 39

Schmutz, Condemnation, Appraiser's Handbook (1938) 149 39

In the Supreme Court of the United States

OCTOBER TERM, 1943

No. 209

UNITED STATES OF AMERICA, PETITIONER,

v.

JOHN WATERHOUSE, ERNEST HAY WODEHOUSE, WALTER FRANCIS FREAR and JOHN EDWARD RUSSELL, TRUSTEES UNDER THE WILL AND OF THE ESTATE OF SAMUEL M. DAMON, DECEASED.

ON WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF FOR RESPONDENTS

QUESTIONS PRESENTED

We disagree with petitioner as to the questions presented.

The questions here are not questions of abstract law. They are whether there was a fair trial on the condemnation of land in Honolulu, Hawaii; whether the trial court committed prejudicial error. They are specific questions arising out of a jury trial. Almost all of the testimony complained of was brought out by Government counsel on cross-examination.

There are no such great and serious questions as "would have important consequences at the present time when the Government is engaged in condemning some 8,000,000 acres of land for natural defense and other purposes", as petitioner asserts. The question is whether justice was done according to law, between the parties in this case.[1]

In our view, the questions presented are (assuming questions not presented below but urged here by petitioner, are to be considered):

1. Whether the trial court committed prejudicial error in admitting or refusing to strike out, the testimony of experts as to the market value of the lands at the date of condemnation, because, after they had testified that the lands were presently adaptable and

---

1. Evidently trial counsel for the Government did not believe the jury had been misled or that the verdict was unfair. He thus addressed the jury after it returned its verdict:

> "Mr. Courtney: I desire to thank the jury for their patient consideration and for their courtesy. I have also to say that I am sorry that the verdict in this case was not more closely approaching the Government's appraisal. That, however, has no bearing whatsoever on what you have done, that was your verdict, and it is an American citizens' verdict,—that is all we want. We would like to be a little more right in our appraisals, but I want to state that it is the duty of the Government and it is the desire of the Government to give the full and fair measure of compensation. That is what the Government holds and that is what the Government will pay, so while it is disappointing that has nothing to do with the case, and I do thank you for your attention and I do appreciate your personal courtesy. I know your deliberations were sound and well considered." (R 442)

in demand for subdivision into residence lots and into truck farms, they gave as reasons for their opinion their estimate of the then rental value of the truck farming land (which rental value they testified would be considered by a willing buyer), and their estimate of its capitalized value, and on cross-examination by the Government gave their views as to the prices which certain portions would command if subdivided.

2. Whether the judgment of the trial court is to be set aside because it was brought out by the Government upon cross-examination of certain expert witnesses, that in arriving at their valuations they considered that the owner would not put its remaining lands on the market as subdivisions in the near future; where the Government introduced evidence to prove that large areas of similar land owned by others were available; where the court instructed the jury that it was not to assume that the owners would pursue any particular policy with respect to such remaining lands; and where the Government never raised the point in the trial court by objecting to testimony or by motions to strike on that ground, or otherwise.

3. Whether the trial court committed prejudicial error in permitting witnesses to testify to market value at the date of taking, without, on its own initiative, requiring that the question on value on direct examination, be framed as in the *Miller* case[1] (i.e. market value, excluding therefrom any value accruing from the authorization of the project); where the

1. *United States v. Miller*, 317 U.S. 369, 372.

Government did not object to the form of the question; where the land condemned was not in fact part of another project; where the Government contended and introduced evidence to prove that proximity of land to a military establishment was a detriment and not an advantage; where the Government asked the valuation questions of its own witnesses in exactly the same form as the owners did; where the Government, on cross-examination, did not ask any witness to measure the value, if any, accruing from the authorization of the project; and where the question was not raised in the trial court, or in the Court below until after it had filed its opinion.

STATEMENT

The Two Suits

On November 20, 1940, the United States, in behalf of the Public Works Agency, filed suit (No. 434) to condemn 77 acres belonging to respondents, to provide housing for persons engaged in national defense activities (R 10).

On November 27, 1940, the United States, on behalf of the Navy, filed a second suit (No. 436) to condemn 254 acres also belonging to the respondents, and adjoining the land condemned in the first suit, to provide housing for Navy personnel (R 40).

The defendants in both suits are the Trustees of the Damon Estate, and the lands being adjacent, the suits were consolidated for trial.

The 77 acres in the first suit (lots C1-C2) is rectangular. Its south boundary is Hickam Army Air Field; its west boundary is Pearl Harbor Navy Yard. Its north boundary fronts on Dillingham Boulevard, which runs directly to the main entrance of the Navy Yard (Ex. A, R 109; B, R 183; C, R 273).

The 254 acres in the second suit consists of two parcels. One, of 192 acres (lots C3A, C3B1 and C3B2) is rectangular and lies directly to the east of the 77 acre parcel. Its northern front is Dillingham Boulevard. The second, of 61 acres, called the Gore lot (lot D) is a triangular piece lying directly to the north of the 77 acre piece, separated from it by Dillingham Boulevard and the road to the Navy Yard. Its westerly side is the Navy Yard, and its hypothenuse fronts on Kamehameha Highway which runs into Dillingham Boulevard at the easterly point of the Gore lot (Exs. A, R 109; B, R 183; C, R 273).

The Lands

The lands are situate in Moanalua, in the City of Honolulu. Honolulu is situate on the Island of Oahu, Territory of Hawaii. The island is 46 miles in length and 25 miles in width. Honolulu lies along the southern shore of the Island and these lands lie to the west, approximately 6½ miles from the center of the City near Pearl Harbor (R 171, 202). Dillingham Boulevard, Kamehameha Highway and the Oahu Railway run directly west from Honolulu past this property.

Pearl Harbor is a natural harbor, also lying to the west of Honolulu. After the annexation of the Islands

in 1898, the United States in 1902 established a navy yard there and from time to time docks, machine shops and other installations have been built, and its harbor deepened and enlarged. The condemned lands lie immediately adjoining the main Navy Yard entrance, facing toward Honolulu.

Hickam Field is a large Army Air Field adjoining the Navy Yard and lying south of the 77 acre and 192 acre parcels. It was established in 1933. Also slightly to the east and south of the lands is Rogers Airport, the Territorial civilian airport for Honolulu.

These lands lie on the line of the Oahu Railroad, which proceeds from Honolulu through the Navy Yard and on to the west. Dillingham Boulevard lies on the south side of the railroad and Kamehameha Highway lies on its north side, leaving it at the east end of the Gore lot and continuing northwesterly along the hypothenuse of the Gore lot. Dillingham Boulevard and Kamehameha Highway are the principal roads leading to the west from Honolulu, and carry heavy traffic. Dillingham Boulevard is the principal road to Hickam Field, Pearl Harbor and Rogers Airport.

At the time the suits were filed, all of the lands except 2.25 acres leased to the Bishop National Bank, were under lease to the Honolulu Plantation Company and were under cultivation for sugar cane (R 116, 312). These lands, with other lands belonging to the Damon Estate, had been under lease for this purpose for many years, the current lease being for the 15-year term January 1, 1927-December 31, 1942, at a rental of $23.50 per acre net after taxes (R 312,

Ex. 1). Though the lease had an unexpired term of two years at the date of condemnation, it was stipulated that no account should be taken of this, but the verdict should be for the value of the full fee (R 103).[1]

The Trial

The trial commenced July 1, 1941.

After impaneling, the jury viewed the lands (R 112).

The Government opened with two expert witnesses (Crozier and Fernandez) who had collaborated and reached identical valuations (R 140) of $137,487. They testified the lands were then leased for growing cane at $23.50 per acre (R 131); that their highest, best and most profitable use was the growing of sugar cane (R 119-123, 135, 145, 150). They denoted a 200 to 250 foot strip on each plot fronting the highway as "the economic zone of influence" (121). This they gave a higher value than the remainder on the ground that it was potentially suitable, as to different portions, for residential (R 144-151) and business (R 121, 149) purposes. The Government then rested.

In opening for the owners, their counsel made clear that the chief issue was whether the land except the frontages was to be valued as mere cane land as contended by the Government, or whether it had higher and more valuable uses (155).

The owners then introduced the testimony of three experts (Castro, Harrison and Kearns) and of re-

1. It seems clear that all the witnesses improperly testified to the value of the land, subject to the lease. This of course was prejudicial to the owners.

spondent Russell, one of the Trustees, as owner. Each testified the lands had outgrown the category of cane lands and their highest, best and most profitable uses were, as to portions, for residences and business, and as to the remainder, truck farming (R 158-171, 204-209, 239-243, 318-321, 326); that the only reason the lands were then being used to grow cane was because of the unexpired lease to Honolulu Plantation Company (R 166). Each further testified the highest and most profitable use of the portions of the property fronting on the highways (aggregating approximately 40 acres in all, according to the experts) was for residence or business purposes, thus agreeing in substance with the Government's witnesses (R 121, 144, 151).[1] They disagreed with the Government's witnesses as to the best use of the rear portions, however, testifying that in their opinion such portions, aggregating 292 acres, were adaptable to and most valuable for truck farming, for raising vegetables, market flowers, chickens and fruit, such as papaya.

Castro, for the owners, testified the lands had outgrown the category of cane lands because of the growth of Honolulu[1] and for two years past buyers of small homes were going as far as twelve miles from the center of the city and would prefer these lands, only 6½ miles from the city's center (R 167, 171).

---

1. Petitioner's brief gives the impression that almost all the land was claimed to be adaptable to residence and business subdivisions. The experts for the owners only classed 40 acres, less than 13%, as such. The remainder of 292 acres they classified as truck farm land.

On cross-examination he testified his estimates were on the basis of the normal expansion of the city and not on the abnormal or emergency conditions existing in 1940 (R 181).

Castro testified that he had taken into consideration all the factors a willing buyer would consider (R 163, 168, 170); that at his valuations, a willing buyer would have made a good investment (R 163) whether he should subdivide and sell or hold and lease (R 198). He did not undertake to say how the buyer would handle any subdivision or how much profit he might make (R 198).

Castro gave his opinion as to the market value of each tract which he found in the aggregate to be $386,599.68 (R 160, 167, 169). He stated on direct examination that he arrived at his opinion by considering the average rental value commanded in this area and by capitalizing it on the basis of the value of money today which he said was 4% (R 161, 163, 167, 169). The court overruled the Government's objection, saying "This is the witness' explanation of his reasoning, his deduction and conclusion by working it out as to its rental value." (R 161). It is clear that the rental value testified to was of the land in its then condition at the date of taking (R 161).

---

1. The Federal census shows the population of the City of Honolulu and the Island of Oahu as follows:

	Honolulu	Oahu
1910	52,183	81,993
1920	83,327	123,496
1930	137,582	202,887
1940	179,359	257,698

On cross-examination the witness said he used the capitalization of rental method to ascertain the value of the fee at the time of condemnation (R 179, 180); that of the area comprising the Gore lot, 16 acres would be adapted to residence lots (R 188); that of the area included in Case No. 434, the frontage with a depth of 150 feet he valued at $30,685 (R 190), and the balance of the tract at $48,850 (R 191); that a similar frontage in the 192 acre tract in Case No. 436, he valued at $110,042 (R 191); that his values did not necessarily assume a subdivision of the three tracts (R 199); that the value placed by him on the Gore lot assumed a road would be constructed at small expense (R 199), and in valuing that tract he assumed a part of it would be subdivided into lots (R 200), and on redirect he stated that in his opinion a buyer would have had that in mind (R 200).

Harrison, the second expert for the owners, testified the lands had outgrown their category as mere cane lands because of "the rapid increase in population, the demand for outside areas and the tremendous traffic going to and from the country down that way" (R 205), and their highest use was for residential and small farm areas (R 205). He said there had been a continuing demand for such areas for the past four or five years, and there had been a number of inquiries for lots out that way (R 205). He testified to his opinion of the market value of each tract, finding the aggregate to be $309,279 (R 205-209, 461). On direct, Harrison testified as to value only on the basis

of the highest, best and most profitable uses, and that he had taken into consideration all the factors a willing buyer would have in mind (R 206, 209). He was neither asked nor did he state on direct that he arrived at his values by estimating and capitalizing rental values or estimating profits from sales (R 203-210).

On cross-examination Harrison testified that in arriving at his opinion of the value of the Gore lot (Lot D) he had, as to the 16 acres fronting the road, assumed a subdivision of 77 lots which would sell for 12½¢ a square foot or an aggregate of $88,223 (R 211, 216). (The market value placed by the witness on the *entire* tract of 61 acres was $63,449 (R 206).)[1] He also based the value on an estimate of the rental obtained if the lands were leased to a person who had in turn leased the area for residence purposes and a capitalization of that rental at 4% (R 216). The remaining portion of 41 acres, he assumed would be leased for small farms (10 acre tracts) and he placed rental values on them of $30, $35 and $40 per acre, which he capitalized at 5% (R 213). The other lands were treated in a similar way (R 216-218). The rentals used as a basis for determining values were in every instance net rentals, i.e. rentals that would be

1. It is evident that Government counsel and the witness misunderstood each other—Government counsel thinking $88,223.12 was the resale price of the entire Gore lot, when the witness had merely testified that this was the assumed resale price of only the 16 acres of residential property which he valued at $35,311 (R 212-3). This error seems to be perpetuated in petitioner's brief here. The misunderstanding was cleared up on redirect (R 222).

received by the willing buyer net, who bought the land from the owner and in turn leased them.

On redirect Harrison stated the buyer might have a different subdivision in mind (R 220), and explained his reference to the figure $88,223 on cross-examination (R 211) was what the buyer could have sold 77 residence lots of the Gore lot for, after he had subdivided it (R 222). A motion to strike out all of the witness' testimony was denied (R 228).

Kearns, the third expert for the owners, testified the highest use was as a "suburban residential area" (R 239) and small farms, because of the great road or highway through the property, the rapid expansion of Honolulu in the last ten years, and the large civilian population employed in Pearl Harbor and Hickam Field (R 239). He gave his opinion as to market values as of November 1940 over objection by Government counsel (R 240, 243, 246), testifying that a portion of each tract was best adapted for subdivision into residence lots (approximately 40 acres in all) and the rest (292 acres) to truck farming, which farming areas he considered had an annual net rental value of $30 to $40 (R 245); that there was a demand for truck farming areas, and these could be readily sold or leased (R 243). The witness also said the buyer could possibly have in mind some other method of subdivision (R 242), and if the buyer bought the land, subdivided it, and put it on the market he would have made a profit (R 241, 247), but he did not testify on direct as to what that profit would be.

The first question asked Kearns on cross-examination was "How much profit, Mr. Kearns" [i.e. how much profit would the buyer make] (R 247). In response he testified the buyer could have made a profit ranging from 16% to 22% (R 247-8). He further testified on cross-examination that the buyer could have disposed of the Gore lot in 18 months and the other tracts in two or three years (R 248-9). The witness testified to the possibility of subdivision and the values of lots after subdivision, giving figures similar to those given by Harrison (R 260) and that his values of the truck farming areas were based on the capitalization of the rental value at 5% (R 262).

Kearns did not testify on direct with respect to capitalization or the earning power of money. The Government on cross-examination, however, questioned him on this subject, and did so before he had testified on cross-examination that in arriving at his value he had capitalized rentals (R 249-253).

The owners' final witness on value was respondent Russell, who testified as owner and not as an expert, as was made clear to the jury (R 311, 313). He had his opinions as to the value of each of the three tracts in November 1940 (R 313, 314, 321, 325, 330). He based his opinion on the fact that the values stated by him represented the capitalization of the estimated net income from rent (R 321) at 4%, which he considered the proper rate to use because he knew large sums of money in the town were looking for 4% investments and could not get them, and any purchaser of the land who used it so as to obtain a net of 4%

interest would have a wonderful investment (R 319). The rental value was based on a plan the Damon estate had worked out several years before and more recently as to the Gore lot (R 314-17, 335) and on their experience with subdivisions in the vicinity (R 316, 332, 339). His values were what he considered a willing buyer would pay (R 327).

On cross-examination Russell said that in late 1939 or early 1940, the Navy became interested in the development of the Gore lot by the Damon Estate to relieve the housing shortage at Pearl Harbor (R 337); that the trustees recognized that they were no longer dealing with cane land and had in mind the gradual development of the land (R 341-343); that they had a subdivision plan of the plot and put a rental value on each lot (R 344); that there were 265 lots which could be disposed of in 12 or 14 months after April, 1941, when the tract would become available, and that they thought the market would rapidly accelerate (R 345); that the market values of these tracts in November, 1940, as previously stated, would be on what the buyer could have earned 4% net (R 351); that 1265 lots on the makai (lower) side of the road could be marketed in five years, during which time they would be increasing in value, but the estimated rents were not so increased (R 353, 354).

Much evidence was introduced showing that in November, 1940, there was an existing and increasing demand for lots at Moanalua for homesites, business purposes, and truck farming, for which purposes the land would yield higher rentals than for cane cultiva-

tion; that such use of the land was not speculative or remote; and had not already taken place because of the unexpired cane lease.

It was testified that there had been four previous subdivisions of lands of the Damon Estate at Moanalua—in 1924, 1929, 1933 and 1938, the lands being leased by the subdivider in each case and not sold (R 282-285). The first, in 1924, consisted of 9.53 acres and was subdivided into 14 lots (R 356) which rented for $133.20 per acre per year net (R 332), and were used as farm lands (R 292); the lots having been disposed of in six months (R 356).

The 1929 subdivision consisted of 121 acres (R 284) subdivided for farm lands and home sites (R 292) at a net annual rental of $42.26 per acre (R 332) and was 90% occupied in two to three years (R 357).

The 1933 subdivision which was located north of John Rodgers Airport (R 284) consisted of 178 acres (R 284) was subdivided into more than 300 lots (R 357) and the lands were rented to a few small farmers who raise chickens and "the rest are home owners who are employed either downtown in business or at the Navy Yard or Hickam Field" (R 293). The net annual rental was $63.88 per acre (R 332). The lands were 90% occupied in a little over three years (R 357).

The fourth subdivision made in 1938, and which was in the immediate vicinity of the condemned lands (R 274 and Gov't Ex. C) was made by Mr. Albert Waterhouse, who leased 11½ acres from the Damon Estate for 25 years (R 271). The rental to the Damon Estate was $80 per acre per year net, the lessee paying

all taxes (R 276). Waterhouse was prevented from using 2½ acres of this area until the cane lease expired in 1942. He subdivided the remaining nine acres into 82 lots (R 272) for cottages which he leased to navy men (R 276). Waterhouse had attempted to acquire additional lands for the same purpose but could not (R 277-280). He testified there was a demand for property of this kind in that vicinity as far back as 1937-1938 (R 280). The evidence of the number of lots and the speed of disposition was introduced by the Government (R 356).

Mr. Sam R. Damon testified all of the lots in the subdivisions of the Damon Estate in 1924, 1929, 1933 and 1938 were fully occupied by tenants prior to November, 1940; that there was a further demand for homesites caused by the building of Hickam Field in 1933, and the gradual enlargement of the Navy, and the increase in the population of Honolulu (R 285, 286, 297); that prior to November, 1940, there was demand for small truck farming areas in Moanalua (R 287); that in partial response to those demands the Trustees contemplated a subdivision of the Gore lot into business sites and home sites (R 287, 288, 335). In July, 1940, with this idea in mind they arranged with Honolulu Plantation Company to surrender the lease on the Gore lot in April, 1941 (R 288); that there was a demand for business property at this time (R 290).

Also it was shown that in 1937 the Trustees sold 3 acres in the immediate vicinity, to Honolulu for a school for $5,250.00, or $1750 per acre (R 301, Ex.

1); and that on September 12, 1940, the Trustees leased to the Bishop Bank 2.25 acres of the 77 acre parcel for thirty-five years, at a rental of $225 per year net ($100 per acre per year) (R 321, Ex. 3).

The Government introduced rebuttal testimony to show the population trend had been to the east rather than to the west of Honolulu and the sale of lots in subdivisions to the west had been slow (R 364); testimony as to the Kamehameha Heights subdivision in 1924-26, the sale prices, the spread between cost and selling prices, etc. (R 370), also as to the Mendonca subdivision (R 372), the number of houses built in Honolulu each year from 1937 to 1940 (R 373); that the purchaser of land in the vicinity of Pearl Harbor could not pay more than 20% of the amount he could sell it for after subdivision and make a profit (R 374); the procedure on subdivision, the size of lots, the percentage in road area and other costs; and that the profit estimate elicited from the owners' witnesses by the Government was less than the necessary margin (R 377).

The Government also introduced testimony that 6% is a reasonable and fair rate of capitalization for land of this kind, and an investor would not be justified in depending on a 4% rate (R 378-9); also testimony that if other lands in the vicinity were subdivided, it would affect downward the market value of the condemned lands (R 381).

Government counsel also offered to prove that land in Wiahawa, a town of 5000 near the entrance to Scofield Barracks (with a population of fifty thou-

sand) was adversely affected in value because placed out of bounds from time to time by the military. This was to rebut testimony that the demand for these properties rested "in some degree" on the personnel of the Army and Navy reservations. This offer was refused (R 397).

A motion by Government counsel to reopen his case, was granted, and testimony and a map (Ex. G) were introduced to show extensive areas, besides the Damon lands, lying in the vicinity of Pearl Harbor, were equally available for subdivision (399-402).

At the close of the testimony the Government moved to strike all the testimony of the witnesses Russell, Castro, Harrison and Kearns on the ground that their evidence was incompetent and not proof of market value since based upon capitalization of income from an alleged subdivision, and, moreover, on speculation and conjecture (R 418-419). The motion was overruled (R 419). A motion for a directed verdict was also overruled (R 419).

The Court then instructed the jury (R 422). The instructions, as the Court below observed, followed closely the law stated in *Olson v. United States,* 292 U.S. 246 (R 461).

After argument by counsel, the jury retired and subsequently rendered verdicts of $61,830.40 in No. 434 and $203,574.40 in No. 436 (R 440-1).

Summary of Valuations and Verdicts

In summary, the valuations given by the various witnesses and the verdicts, are:

Source	Case No. 434 Lots C-1 and C-2 (77 acres)	Case No. 436 Lot D (Gore lot) (82 acres)	Case No. 436 (192 acres)	Total
Government witnesses	$ 33,498.00	$ 25,263.00	$ 78,706.00	$137,487.00
Harrison & Kearns	63,772.35	63,449.43	182,058.00	309,279.78
Castro	79,715.43	79,311.75	227,572.50	386,599.68
Russell	170,279.17	127,931.25	216,134.75	514,345.17
Verdicts	61,830.40	$203,574.40		265,404.80

The awards mathematically are at the rate of $800 per acre for the land in each case.

Proceedings in Circuit Court of Appeals

Thereafter the Government appealed to the Circuit Court of Appeals for the Ninth Circuit (R 36, 76), which, on January 6, 1943, affirmed the judgments (R 457, 132 F.2d 699), and, on March 2, 1943, denied a petition for rehearing (R 464).

SUMMARY OF ARGUMENT

Petitioner specifies as errors by the Court below certain alleged holdings by it (Pet. br. p. 8).

First. Petitioner asserts that the Court below held that the value of agricultural land claimed to be adaptable for subdivision may be determined by capitalizing the estimated income which might be produced if the lands were subdivided and leased for dwellings, business places and truck gardens.

We contend that the Court below made no such holding (R 457).

Petitioner's claim that the owner's witnesses based their valuations on sales prices or rentals after subdivision is unfounded, as the Court below points out (R 462).

The owner's evidence consisted of estimates of the market value of the lands at the time of condemnation, having in mind their then adaptability to and existing demand for use for residence, business purposes, and for truck farms. The evidence is clearly admissible in accordance with accepted legal principles. No reversible error was committed by the trial court, and the Court below committed no error in affirming the judgment.

Second. Petitioner asserts that the Court below committed error in holding that value arising from a landowner's monopoly of undeveloped lands may be included in the just compensation awarded upon condemnation of a part of that land.

We contend that the Court below made no such holding (R 457).

The fact that some, not all, of the owner's witnesses on cross examination stated, that in arriving at their valuations, they considered the owner would not put its remaining lands on the market as subdivisions in the near future, was not error because: (1) the matter reflects on the weight of such testimony and not on its admissibility; (2) the Court properly instructed the jury that it was not to assume that the owner

would pursue any particular policy with respect to such remaining lands; (3) the Government introduced evidence to prove that large areas of similar land owned by others was available, and (4) the Government never raised the point in the trial court by objecting to testimony or by motions to strike on that ground or otherwise.

Third. Petitioner asserts that the Court below erred in holding that enhancement of value due to the project for which the lands are taken, may be included in the compensation paid for such lands.

We assert that the Court below made no such holding (R 457).

We contend that (1) the Government advanced no such contention in the trial court; (2) there is no factual basis in the record for the Government's contention that the lands taken were part of another project; (3) the Government made no objection to the form of the valuation questions and asked the valuation questions of its own witnesses in exactly the same form as the owner did; and (4) the Government contended and introduced evidence to prove that proximity of the land to a military establishment was a detriment and not an advantage.

ARGUMENT

Petitioner has specified as errors, certain alleged holdings of the Court below —phrased as questions which petitioner asserts are presented here (Pet. Br. p. 8). As already pointed out, we do not agree. More-

over, we do not agree that the Court below took the action or made the holdings which petitioner asserts to be erroneous.

We will consider petitioner's specifications of error in order:

SPECIFIED ERROR 1.

Petitioner asserts the Circuit Court of Appeals erred—

> "1. In holding that the value of agricultural land claimed to be adaptable for subdivision purposes may be determined by capitalizing the estimated income that might be produced, if the lands were subdivided and leased for dwellings, business places and truck gardens." (Pet. Brief p. 8)

We submit the Court below made no such holding, as an examination of its opinion will show (R 457).

Petitioner asserts here (Pet. Br. p. 8) (and a similar assertion was made in the Court below) that—

> "All of the respondents' witnesses based their valuations upon the estimated sales prices or the capitalization of estimated rentals which they thought could be obtained from residence, business or truck farm lots after subdivision of the sugar cane lands. Such evidence was wholly incompetent and should have been excluded * * *."

The Circuit Court of Appeals, in passing on this contention said (R 462):

> "After careful scrutiny of the record, we believe the testimony for appellees [owners] was different than the description of it made by

appellant [Government]. Appellees' valuation witnesses testified as to the market value of the land in November 1940 * * *."

"Appellant's argument is based on the assumption that appellees' witnesses were testifying as to what prices the land would sell for if subdivided, and as to rents which could be derived from the land if it were improved. The effect of that argument is that such witnesses were testifying not as to present value but as to some future value. The record gives no support to that argument, but, in fact, shows that the witnesses were testifying as to the value of the land in November 1940."

Furthermore, the Court below having first determined that the owners' witnesses testified to the market value of the land in November, 1940, and not to its future value as subdivided, as the Government contended, then correctly applied the law. It did not, as petitioner suggests, hold that value could be determined by capitalizing the estimated income if the land were subdivided and leased. What the Court below did, was to apply the rule of *Olson v. United States,* 292 U.S. 246, and on its authority, and other cases cited, hold that the trial court had not committed error (R 461-4).

It will thus be seen that the question posed by petitioner is not in the case, and the Court below made no such error as is specified here by petitioner.

The Owners Did Not Contend for Subdivided or Business Values: Their Claim Was Only for the Then Market Value Having in Mind the Then Demand for the Property for Subdivision.

The owners at no time contended that the value of the land was to be determined by estimated sales prices, or capitalized estimated rentals, to be obtained after subdivision, nor did they introduce evidence to that effect.

What the owners contended, and what they introduced evidence to show, was:

1. That the lands which had been cultivated in sugar cane for years, and which at condemnation were subject to a 15-year lease to a sugar plantation with two years of the term unexpired, had outgrown their category of cane land and by reason of the steady growth of Honolulu, the increase in the population, and the development of the adjoining Navy Yard and Hickam Field, with their increasing number of civilian employees, were presently adaptable to and in present demand for a higher and more valuable use than the growing of sugar cane, to wit, for residence and business use, as to approximately 40 acres adjacent to the highways, and as to the remaining 292 acres, for truck farms, all of which would have been taken into consideration by the buyer and seller in any negotiation for the property.

2. That the foregoing should be given consideration in determining the market value of the lands on the date of condemnation, and that estimates by qualified witnesses could properly take these facts into consideration.

The Government witnesses having testified to the rental under the existing sugar lease (R 131), having given the tons of cane and sugar produced per acre, and having tenaciously contended that the highest and most profitable use of the lands was for growing sugar cane (119, 123), the owners naturally met those contentions by showing that the lands were presently adaptable for residence purposes and small farms, that lands in the vicinity had been leased or sold for these purposes, that there was a present existing and growing demand for this property for such purposes, and having these things in mind, a willing purchaser would have paid as of the date of condemnation, the various amounts stated by the witnesses.

None of the owners' witnesses was asked or testified on direct examination as to the rental value or sales prices after subdivision, or as to the capitalization of rental values after subdivision, nor were their opinions as to market values based on the capitalization of the net income which could be derived if and when the lands were subdivided and leased. Their opinions were as to the market values of the tracts as they stood in November, 1940, in view of their suitability for, and adaptability to, the better and more profitable use for sale or lease for business and homes and small farms, which opinions were based on what the witnesses believed were the then rental values of the land. The existing lease which yielded $23.50 net per acre annual rental as cane land, would shortly expire, and the witnesses believed that the rental value of the lands was greater than the rental reserved in the lease,

having in view the potential use. In other words, it was the market values of the tracts and not the value of the subdivided lots to which the witnesses testified.

The Trial Court Committed No Error in Its Rulings.

The evidence offered by the owners was admissible and the trial court did not err in ruling on the Government's objections or its motions.

As hereafter pointed out, the court's rulings would not constitute prejudicial error, even if the owners' evidence was not properly admissible, but the evidence offered was clearly proper, as found by the Court below.

The owners' evidence was principally directed to two points—

1. The highest and best use for the land; and

2. Its market value having those uses in mind.

1. The owners' evidence of the highest and best use showed that although presently planted to cane it was then suitable and in actual demand for residence, business and farm use.

As pointed out in *Olson v. United States,* 292 U.S. 246, 255 "The highest and most profitable use for which the property is adaptable and needed or likely to be needed in the reasonably near future, is to be considered, not necessarily as the measure of value, but to the full extent that the prospect of demand for such use, affects the market value while the property is privately held."

Here the land was under cultivation for cane, under a long lease with two years unexpired. Did the evidence show that its highest and most profitable use was, as claimed by the owners, for residence and business purposes as to approximately 40 acres adjoining the highways, and for small truck farms as to the balance of 292 acres? The evidence upon this issue was in part as follows:

The Government witnesses testified that the land fronting the highways to a depth of 200 to 250 feet had a higher value for other uses than for cane land (R 118, 121, 123, 126, 151).

The owners' witnesses testified there was an existing and growing demand for the land for residence, business and truck farms; only the unexpired cane lease had prevented earlier development (R 243, 249, 265, 287).

On September 12, 1940, 2.2 acres of the lands had been leased to the Bishop Bank for 30 years at an annual rate of $100 per acre per annum net (R 323, Ex. 3).

On December 17, 1937, the owners had sold 3 acres of adjoining property to the City of Honolulu for a school at $1750 per acre (R 303, Ex. 1).

There were two banks and a park in the immediate vicinity (R 118, 139).

The lands fronted on main highways on which there was heavy and increasing traffic.

The lands adjoined Hickam Field and Pearl Harbor Navy Yard.

Nearby properties of the owners had been leased for subdivision or had been subdivided and leased for residence and truck farms as follows: 1924—9.5 acres; 1929—121.5 acres; 1933—178.7 acres; 1938—11.5 acres (283-5).

The owners had been approached by the Navy in 1939 or early 1940 with the view to the owners erecting housing on these lands to relieve the shortage at Pearl Harbor (337).

The owners had planned a subdivision of the property and as early as July 1940 had arranged with Honolulu Plantation Company for a surrender of its lease on the Gore lot as of April 1941, to permit such subdivision (R 288).

The allegations in the petitions are that the lands are necessary as sites for housing for persons engaged in national defense activities or for navy personnel (R 10, 11, 41).

The evidence here admitted was more direct and persuasive of potential use and present value than was that which this Court in *McCandless v. United States,* 298 U.S. 342, held it was error to exclude. There the owner of cattle lands in Hawaii introduced evidence that the land was (p. 343) "suitable for growing cane and would produce an average of 70 to 75 tons of sugar cane to the acre, from which could be extracted 8 or 9 tons of sugar" and offered evidence to prove that it was adaptable to the purposes

of a sugar plantation, by bringing water from a distance of 8 to 10½ miles; that the cost of recovering and transporting such water would render the use of it economically feasible and profitable; that these matters would be taken into consideration by a prospective purchaser of the land. This Court held that the exclusion of this evidence was prejudicial error.

It should be noted that the Government there contended that the offer of proof was insufficient because it did not "exhibit an intention to show how much the value of the land would be increased or the probable cost of the irrigation improvement"—quite the opposite of its position here.

There can be no question but that the evidence showed clearly that the lands were in present demand for business and residence purposes as to about 40 acres fronting on the highways, and for truck farming as to the remaining 292.

2. The owners' evidence as to market value was admissible.

The evidence as to value introduced by the owners is shown in our statement of facts. It is submitted that it was proper and admissible. It consisted of estimates by qualified witnesses of the market value of the land at date of condemnation having in mind the highest and most profitable use. It did not consist of estimates of value after subdivision, but of value of the land as of the date of taking in its then condition.

Petitioner devotes many pages to a discussion of the proposition that market value of agricultural land may not be arrived at by capitalizing the net income which in the opinions of witnesses could be obtained if the lands were subdivided and leased for dwellings, business places and truck gardens (Pet. Br. p. 12-19), and, as subsidiary to that proposition, that agricultural land may not be valued by capitalizing the estimated net income which might be earned after subdivision into lots (Pet. Br. p. 20-30), and cites many cases.

We do not find it necessary to contest the validity of either of these propositions, for they do not apply here. The owner did not introduce evidence of the value of the land or its net income after subdivision, nor evidence of the capitalization of its net income after subdivision into lots. The owner's witnesses valued the land at the date of taking in its then condition, having in mind its then adaptability to, and its present demand for, residence, business and farming uses, and based their views in part on the capitalization of net rentals obtainable at time of taking by a willing buyer, in purchasing with those uses in mind.

The many cases cited are not in point. As we will illustrate later, the facts in every one, upon examination, will be found to involve the value of the land after subdivision, or the earnings of improvements or of a business, or a failure to prove that demand for subdivision was reasonably to be expected, or some other condition not present here.

It is not clear that petitioner contends that estimates of rental value of the lands at the date of taking in their then condition, but for a different use, are improper. If such is petitioner's contention, it is submitted that it is erroneous and that estimates of such rental value are admissible in a case such as this, as the Court below held.

All the experts, both Government and owners, agreed that the highway frontages were adaptable to residence and business use. They differed as to value. As to the portions back of the frontage strips, the Government's witnesses took the view that they were best suited to the cultivation of cane. The owners' witnesses considered those areas as suitable for small farms and truck gardening, which would indicate a higher rental value, and in forming their opinions of value they took that rental value into consideration in connection with the known demand for such areas for such purpose.

If the land is adaptable for some better and more profitable use than that for which it was theretofore used, the landowner is entitled to the benefit of that. It obviously follows that the value of the land for another use may be shown to be more profitable. That necessarily involves evidence of the value for that use. How is that value to be ascertained? Various elements, including demand for use, enter into the matter of value. *Monongahela Nav. Co. v. United States,* 148 U.S. 312, 328.

The question must be reasoned out upon a practical basis, having in mind the factors which a willing

buyer would take into consideration when negotiating for the purchase of the land, *Boom Co. v. Patterson*, 98 U.S. 403, 407.

In buying for an investment a prospective buyer would naturally consider whether for another use, a better rent could be obtained than had previously been paid. In other words, was the land worth more for purposes other than the cultivation of cane, and if so, how much more? The landowner is entitled to lay before the jury through competent witnesses what in their opinion the willing buyer would have in mind, and what he would pay for the land.

It was natural that the witnesses should have considered rental value in forming their opinions of market value.

There was evidence of but one sale of land at Moanalua. That was of the school lot in 1937. These lands had been under lease for many years for cane cultivation at $23.50 per acre per annum net. A lot adjoining Hickam Field had recently been leased to the Bishop Bank. Several nearby pieces had been leased in small lots. The class of people who would take up land for small farming habitually hold under leases. Rental value was properly considered as an important factor in determining the market value of the land.

To say that evidence of the estimated rental value of the land, in view of its better and more profitable use, cannot be shown, would be equivalent to saying that the owner cannot have the benefit of the value which the potential use of the land would justify.

Rental value is admissible as evidence of the market value of land. 29 C.J.S. p. 1266; *United States v. Shingle,* 91 F.2d 85, 86, cert. den. 302 U.S. 746; *Assessors of Quincy v. Boston Con. Gas Co.,* 309 Mass. 60, 34 N.E.(2) 623, 626; *Re Taxes Bishop Estate,* 27 Haw. 190, 196.

Rental value being an important consideration in determining market value of land, it logically follows that in a case where, as here, the evidence shows that the land has a present value and is in demand for a better and more profitable use, it is admissible. The landowner may therefore show, not only what rental the land is presently yielding, but what it is capable of producing. Orgel on Valuation Under Eminent Domain, p. 570; *Chicago, Burlington & Quincy Ry. v. North Kansas City Co.,* 134 F.2d 142 (C.C.A. 8), cert. denied 319 U.S. 771; *Northern Pac. R. Co. v. North American Tel. Co.,* 230 Fed. 347, 352 (C.C.A. 8), cert. den. 249 U.S. 607; *Lebanon & Nashville Turnpike Co. v. Creveling,* 159 Tenn. 147, 17 S.W.(2) 22, 26; *Idaho Farm Dev. Co. v. Brackett,* 36 Idaho 748, 213 Pac. 696, 699; *Somers v. Meriden,* 119 Conn. 5, 174 Atl. 184, 186; *Sanitary District of Chicago v. Pittsburgh F. W. & C. R. Co.,* 216 Ill. 575, 75 N.E. 248, 252; *State v. Suffield & Thompsonville Bridge Co.,* 82 Conn. 460, 74 Atl. 775, 778; *Gearhart v. Clear Spring Water Co.,* 202 Pa. 292, 51 Atl. 891, 892; *Egan v. Philadelphia,* 108 Pa. Sup. 271, 164 Atl. 813, 815; *In re Taxes Carniot Estate,* 13 Haw. 688, 689.

The cases cited in this connection in petitioner's brief (pp. 13-14) are not inconsistent with the foregoing. They can be readily differentiated.

In *Pennsylvania S. V. R. Co. v. Cleary,* 125 Pa. 442, 451, 17 Atl. 468, the jury was instructed to consider how the lands could best be subdivided, how fast the lots could be sold, and at what price. No such question was asked by the owners or submitted to the jury here.

In *Hall v. Delaware L. & W. Ry. Co.,* 262 Pa. 292, 105 Atl. 98, the landowner sought to show that a tract was available for "elaborate and palatial home sites" and hence worth more than mere agricultural land. No showing was made of any present demand for such sites; the market and demand were "limited and precarious."

In *Laureldale Cemetery Co. v. Reading Co.,* 303 Pa. 315, 154 Atl. 372, a cemetery company which had acquired vacant land five miles from Reading, Pennsylvania, for $500 per acre, sought to prove in a condemnation case four years later a value of $26,000 per acre by evidence of anticipated profits from the sale of sepulture rights 30 years in the future. The court, observing that this "looked like real estate alchemy" excluded the evidence.

In *Chatfield v. Board of Revision of Taxes,* 346 Pa. 159, 29 A.2d 685, it was sought to prove that the present value of an unsubdivided area was equal to the gross selling prices after subdivision and the building of homes, less expenses. As noted above, that is precisely what the owner's witnesses did not do here.

City of Los Angeles v. Hughes, 202 Cal. 731, 262 Pac. 737, *Louisville & N. R. Co. v. Montluzin Co.,* 166

La. 211, 116 So. 854, and *Kansas City & Topeka Ry. Co. v. Splitlog,* 45 Kan. 68, 72, 25 Pac. 202, were cases where the owner was contending that the value of the lots after subdivision was the measure of his compensation. In the case at bar the values were those before subdivision.

In *Monongahela West Penn. Pub. Serv. Co. v. Monongahela Devel. Co.,* 101 W.Va. 165, 132 S.E. 380, value for subdivision purposes was rejected because no showing had been made of any demand for that purpose. Here the existing demand was clearly proved.

In *Wadsworth Land Co. v. Piedmont Traction Co.,* 162 N.C. 503, 78 S.E. 299, it was sought to show that bottom lands subject to overflow could be made into a park which could be beautified by laying of walks, building summer houses and otherwise and that such improvements would enhance the value of the remaining lands for residence purposes. This was properly rejected as too speculative.

The remaining cases, *Pullman Co. v. Chicago,* 224 Ill. 248, 79 N.E. 572; *Burt v. Wigglesworth,* 117 Mass. 302, 306; *Greenfield v. City of Philadelphia,* 282 Pa. 344, 354, 127 Atl. 768; *Matter of City of New York* (Blackwells Island Bridge), 118 App. Div. 272, 274-275, 103 N.Y. Supp. 441; *Tallman v. Met. El. R. Co.,* 121 N.Y. 119, 23 N.E. 1134, all involve situations where the owner sought to show what the lands would be worth after erecting buildings thereon and contended that these sums, less the expenses of building were the measure of his compensation. And in *Burt v. Wiggles-*

worth, supra, the court indicated that while such evidence was too prospective and indefinite in nature to be competent evidence of the present value of the land not built upon, it might be stated by an expert as one of the reasons upon which his opinion as to the present value of the land is founded. (117 Mass. at 306, citing as authority *Dickenson v. Fitchburg,* 13 Gray (Mass.) 546.)

In *Pullman Co. v. City of Chicago,* supra, the court did not even hold that such evidence was inadmissible, but only that the jury was justified in not fixing the present value of the land at a figure approaching the estimated value after the building was erected; in short, that the objection went to the weight rather than the admissibility of the evidence.

Nor are the cases cited by petitioner on pages 20 and 21 of its brief apposite here. In each of these cases, as petitioner itself states, the owner sought to introduce as evidence of the market value of land, evidence of the profits which would be realized from a business conducted or a building erected on the land. Obviously such evidence does not indicate the present value of the land. Here the owner introduced no such evidence and made no such contention.

Petitioner's attempted distinction of *North American Telegraph Co. v. Northern Pac. Ry. Co.,* 254 Fed. 417 (C.C.A. 8) supra, and *United States v. Shingle,* 91 F.2d 85 (C.C.A. 9), supra, viz. that they stand only for "the proposition that the capitalization of rentals accruing from existing leases is some evidence of

value" (Pet. Br. p. 26) is not sound. In the North American Telegraph case the railroad successfully established its contention that a higher rental value than that accruing from the existing lease should be the basis of capitalization. And in the *Shingle* case, the owner successfully established his contention that his rights of fishery had a higher rental value, viz. $3600 per year, than that stipulated in the existing lease thereof, which was $3,000 per year (see Record in *Shingle* case, pp. 73-75), and that $3600 rather than $3,000 should be the basis of capitalization in order to determine the value of the rights.

Petitioner (Br. pp. 26-27) cites *McCandless v. United States,* 74 F.2d 596 (C.C.A. 9th). There the court dealt with the admissibility of evidence of rental under certain leases of Government lands in the vicinity, which had been let at auction and contained special provisions, but it made no reference to the rental value of the land taken. It is not authority on the point to which the case is cited in the brief. It did not hold that the rental value of the condemned land was inadmissible.

The profits to be derived from a business are a vastly different thing from the rent to be derived from land, since such profits would depend on the amount of capital invested, business conditions, the business capacity of the proprietor, and other possible considerations, none of which would have any relation to the value of the land upon which the business was being conducted. Care must be taken to distinguish the one from the other. 2 *Nichols on Eminent Domain*

(2nd ed.) p. 1172; *Assessors of Quincy v. Boston Con. Gas Co.*, 309 Mass. 860, 34 N.E.(2) 623, 626; *Denver v. Quick*, 108 Col. 111, 113 P.(2) 999.

The distinction was pointed out in *Gearhart v. Clear Spring Water Co.*, 202 Pa. 292, 51 Atl. 891, where the court said (p. 892): "The probable returns from an investment in land because of the use which may be made of it is a consideration which enters into an intelligent estimate of its value, and is entirely distinct from an estimate based on the profits of a business which may be conducted on it." See, also, *National Brick Co. v. United States*, 131 F.2d 30 (App.D.C.).

In *Orgel on Valuation Under Eminent Domain*, p. 568, it is stated that "Although courts and text-book writers have often stated that, as a general rule, income in the nature of profits from a business is not admissible evidence of the value of the premises on which the business is located, they have also stated that, as a general rule, income in the nature of rents is admissible."

In *Cleveland, etc. R. Co. v. Backus*, 154 U.S. 439, 445, the court said "But the value of property results from the use to which it is put and varies with the profitableness of that use, present and prospective, actual and anticipated."

It being clear, then, that evidence of rental value of portions of these tracts for small farming was properly admitted, it follows that it was proper to capitalize it in order to ascertain the market value of the

land. When rental value is considered as a basis for ascertaining the value of land, it must be capitalized at some rate. What rate of capitalization should be used is a question of fact for the jury to decide. *Orgel on Valuation Under Eminent Domain*, p. 575; *Bonbright on Valuation of Property* (Vol. I), p. 415; *Schmutz, Appraiser's Handbook*, p. 149; *North American Tel. Co. v. Northern Pacific R. Co.*, 254 Fed. 417, 418; *Chicago & N. W. R. Co. v. Chicago Mechanics Institute*, 239 Ill. 197, 87 N.E. 933, 943; *Lomas & Nettleton Co. v. Waterbury*, 116 Conn. 253, 188 Atl. 433, 435; *Re Taxes Bishop Estate*, 27 Haw. 190, 195.

On page 25 of petitioner's brief, Schmutz, Appraiser's Handbook is quoted as stating that in the selection of a rate of capitalization lies a great danger, since the difference between a 5% and 6% rate will occasion a difference of 20% in the value estimate. But Schmutz does not say that capitalization of income is not a proper and accepted method of estimating values. On the contrary, a substantial portion of his book is devoted to a discussion of that method, and its application. He says (p. 7) "The processing of factual data into value estimates may be accomplished by any of these approaches, all of which are desirable although not equally so at all times. They are: (1) The comparative approach; (2) The reproduction cost approach; (3) The capitalization approach." All Mr. Schmutz was concerned about was the selection of the proper rate for capitalization.

What the author there stated with respect to rates of capitalization would equally apply to the difficulty of ascertaining market value by other means than the capitalization of rental value. An examination of condemnation cases involving the market value of land will show that opinions of witnesses are often widely divergent without any question of capitalization of rent being involved. In any event, the court or jury is obliged to wrestle with sharply conflicting opinions frequently more divergent than the 20% which troubled Mr. Schmutz.

The Government in the trial court evidently believed that capitalization of rentals was a proper basis for an estimate of market value, for it introduced evidence on the point. On rebuttal Crozier, in response to questions by Government counsel, testified that 6% was the proper, reasonable and fair rate of capitalization in Honolulu (R 378-9). The issue therefore left to the jury was whether 4% or 5% as contended by the owners' experts, or 6% as contended by the Government experts, or some other rate or no rate was proper. The jury was not bound by the testimony of either, but was free to choose such rate or no rate as under the evidence it found proper.

The proper rate of capitalization to be used turns to a large extent upon the value of money and its earning power, which, it is common knowledge, has decreased in recent years.

Opinions of experts are taken in condemnation cases to help the court or jury in determining market

value. Petitioner's theory seems to be that while the owners' witnesses properly stated their opinions that portions of these tracts were more valuable for truck farming than for cane cultivation, they should not have been permitted to say they had a higher rental value because of the potential better use. We submit that the authorities do not sustain that contention.

Proof of Market Value.

The owners' witnesses testified to the market value of the land at the date of taking based on its adaptability for residence, business and truck farming, for which they testified there was a present and continuing demand. As pointed out, they did not base their opinions on the speculative profits of a subdivision.

The market value of land cannot be demonstrated mathematically. It necessarily rests in opinion, and like that of other commodities, depends largely on the law of supply and demand.

That there was a demand for this property in subdivided lots for residence and business purposes and for small farm areas was amply shown, as already pointed out.

The existence of a demand is an important factor which must be taken into consideration in ascertaining value for a potential use. *Olson v. United States,* 292 U.S. 246, 256; *Vineyard Grove Co. v. Oak Bluffs,* 265 Mass. 270, 163 N.E. 888, 891; *Sullivan v. Missouri K. & T. R. Co.,* 29 Tex. Civ. App. 429, 68 S.W. 745, 747.

Demand has a bearing on the difference between probability and possibility which distinguishes potential use from mere speculative hazards. *Chicago B. & Q. R. Co. v. Chicago,* 166 U.S. 226, 250. Hence the distinction between what land may be worth in the future, and what it is worth now in view of the future. *Portland & R. R. R. v. Inhabitants of Deering,* 78 Me. 61, 2 Atl. 670, 671.

No evidence should be excluded which an ordinarily prudent man would take into account before forming a judgment as to the market value of property which he is about to purchase. 29 *C. J. S.;* p. 1261, Sec. 273; 2 *Nichols, Eminent Domain* (2nd ed.), p. 1168, Sec. 444; *State v. Styner,* 58 Ida. 233, 72 Pac.(2) 699, 704; *Ranck v. Cedar Rapids,* 134 Ia. 563, 111 N.W. 1027, 1028; *North American Tel. Co. v. Northern Pac. R. Co.,* 254 Fed. 417, 419 (C.C.A. 8).

The value of property as an investment is properly considered in determining market value. *United States v. Powelson,* 118 Fed. (2) 79, 86; *Gearhart v. Clear Spring Water Co.,* 202 Pa. 292, 51 Atl. 891, 892.

That is the point that Mr. Russell, one of the owners, stressed when he expressed his conclusion.

And plans of the owner for the development of the property may be shown. *McCandless v. United States,* 298 U.S. 342, 343; *Crystal City R. Co. v. Isbell,* 126 S.W. (Tex.) 47; *Union Electric L. & P. Co. v. Snyder Estate Co.,* 65 Fed. (2) 297, 304; *United States v. Powelson,* 118 Fed. (2) 79, 84. All values are anticipations of the future. *Lincoln v. Commonwealth,* 164 Mass. 368, 41 N.E. 489, 491.

There was nothing fantastic or speculative, we submit, in the testimony of the owners' witnesses concerning the suitability of these tracts for subdivision, the demand for lots, and the estimates of the value of the tracts based on the capitalization of the then rental values. None of those factors would have been overlooked by an intelligent buyer. That the buyer's conclusion may have differed from that of the witnesses, as the verdicts indicated, does not render the testimony improper.

The weight to be accorded to opinion evidence, depends on the reasons assigned for the conclusions of the witnesses, and is for the jury to determine. *People v. McReynolds,* 31 Cal. App. (2) 219, 227, 87 Pac.(2) 734, 739.

The Evidence Complained of Was Brought Out by the Government and Its Admission Is Therefore Not Error.

The owners' case in chief consisted of showing (1) that the property when taken was then in demand as to 40 acres for residence and business purposes, and as to 292 acres for market farming, and (2) that the market value thereof at date of taking, having in mind such uses, was as stated by its expert witnesses and one of the owners. None of these witnesses testified on direct examination what the lands would sell or rent for after subdivision; their testimony was confined to what the lands would sell for at date of taking, having in mind their potential use for subdivision and truck farm use, and some of the witnesses in fixing such values did so by first estimating

the rental values of the farm area in its then condition and by then capitalizing such rental value.

The only estimates of what the land would sell for in its subdivided state, or the profit that a purchaser would make who later subdivided or sold, were brought out by the Government on cross-examination. Furthermore, having brought the matter out on cross-examination, the Government pursued the matter by introducing evidence on the same subject, in an effort to show that the testimony of the owners' witnesses was not sound and therefore not to be accepted. Under such circumstances the Government cannot complain if its motion to strike was denied.

As pointed out in the *Miller* case, "even in the ordinary case, assessment of market value involves the use of assumptions, which make it unlikely that the appraisal will reflect true value with nicety" and "involves at best a guess by informed persons" (*United States v. Miller,* 317 U.S. 369, 374).

The question of value is for the jury, which is not bound by the opinion testimony, and gives to it only such weight as it believes it justifies. The testing of the witnesses' qualifications, assumptions and reasoning by cross-examination, is the proper and prescribed method of exposing to the jury the lack of value of the witnesses' opinion. For that reason cross-examination of the widest latitude is permitted.

Here the owners' witnesses having testified on direct to the market value at the time of taking, having in mind the higher use, it was appropriate for

the Government by cross-examination to endeavor to discredit such testimony by showing that their assumptions were ill founded and their conclusions invalid. The owners' witnesses having testified that 40 acres were suitable and in demand for residences and business, and 292 acres for small farms, instead of for cane growing as the Government contended, and having given in support of their opinions, the rentals that could be obtained for farm lands, and the capitalization thereof at various rates, the Government was entitled to and did, exhaustively cross-examine them as to their assumptions and the basis therefor. It asked the witnesses how a willing buyer would subdivide the land, what the lots and farms would rent or sell for, what improvements would be required, what profits the subdivider would make, what the ratio between market value and the gross selling prices after subdivision would be, and finally what was the proper rule of capitalization to translate rental income into fee market value. Moreover, the Government introduced evidence on the issue of the proper rate of capitalization, on the ratio between the gross selling price of subdivided land and the market value before subdivision, and on the availability of other lands. It showed the prices at which other subdivisions had been sold, and in every way tried to show the jury that the valuation estimates of the owners' witnesses were not well founded. All this went to the weight of the evidence and not to its admissibility.

The testimony of which petitioner complains was not elicited by the owners but by the Government on cross-examination of the owners' witnesses.

A party who on cross-examination of an expert witness asks him to give his reason for his opinion cannot object to the answer on the ground that it is inadmissible. A party who himself elicits testimony cannot object to its admissibility. 4 *C. J.*, p. 703, Sec. 2613; *Fidelity & Casualty Co. v. Griner,* 44 Fed. (2) 706, 709; *Reed v. Prudential Ins. Co.,* 229 Mo. App. 90, 73 S.W. (2) 1027, 1033; *Schulmeyer's Guardianship v. McAllister,* 171 Cal. 340, 153 Pac. 233, 235; *Behrenfeld v. Breedlove,* 27 Cal. App. 419, 150 Pac. 71, 72; *Brownell v. Moorehead,* 65 Okl. 218, 165 Pac. 408, 410.

By way of illustration, we may refer to the testimony concerning Lot D, the Gore lot, which contains an area of 61 acres.

Harrison, on his direct examination, testified that in his opinion the market value of that tract in November, 1940, was $63,449 (R 205, 206). In that connection he made no reference to any subdivision nor did he mention rental value or buyer's profit.

On cross-examination, he said he had assumed a subdivision of a portion of the tract containing 16 acres into 77 lots, putting a value on each lot at 12½ cents per square foot when subdivided, which would reflect a value for that portion of the tract of $88,223.12 (R 210, 211). The rest of the area, amounting to 41 acres, he valued, as of November, 1940, as

having a rental value of $33.58 per acre per annum, which he capitalized at 5% (R 217).

On redirect, the witness made it clear that the figure $88,223, which he mentioned on his cross-examination, was what he believed the willing buyer could have sold the 77 lots for (R 221, 222).

The witness Kearns, on his direct examination, testified that in his opinion a willing buyer would have paid a willing seller for the Gore lot in November, 1940, $63,449, considering a portion of it for subdivision into residence lots and the rest as acreage for truck farming (R 240-242), and that the buyer would have made a profit (R 241, 247).

The witness made no reference to the number of lots the residence area could be divided into, nor to what they might be sold for, nor to the amount of profit the buyer could make.

On cross-examination the witness said that if a buyer paid $63,449, plus expenses (of subdivision), and sold for $116,357, he would have realized a profit of approximately 16% (R 248). He assumed a subdivision of a portion of the tract into 77 lots, comprising 705,785 square feet, valued at 12½ cents per foot, which would show a total value of $88,223 (R 261). The rest of the area of the lot, 41 acres, he valued (as of November, 1940) at $671.60 per acre for truck farming, based on the capitalization of the rental value at 5% (R 262).

How the buyer might have subdivided the potential residence areas, how many lots he may have made out

of those areas, how much he could have sold the lots for, or how much profit he might make if he had bought at the market values stated by the witnesses for the owners, formed no part of their case, and the witnesses were not questioned on direct examination upon those particulars, as an examination of the record will show.

Whatever there is in the record with reference to such matters, was elicited by counsel for the Government on cross-examination (R 211, 212, 215, 218, 260, 261).

A very broad latitude is allowed in the cross-examination of an expert witness to the end that his experience and judgment and the value of his opinion may be thoroughly tested. Such cross-examination, however, though it may materially affect the weight of the testimony given, does not affect its admissibility. *Stockton v. Ellingwood,* 96 Cal. App. 708, 275 Pac. 228, 234; *Metropolitan Water Dist. v. Adams,* 116 Pac.(2) 7, 20 (Cal.); *Los Angeles v. Deacon,* 119 Cal. App. 491, 7 Pac.(2) 378, 379.

Competent evidence given by an expert witness is not to be stricken merely because the cross-examination may have affected its weight. *Oakland Water Front Co. v. Le Roy,* 282 Fed. 385, 387; *Neddermeyer v. Crawford Co.,* 190 Ia. 883, 175 N.W. 339, 342.

It is stated in petitioner's brief (pp. 5, 6) that Castro and Russell fixed present value by capitalizing at four per cent the net income which in their judgment would be obtained if all the lands were leased after they were subdivided.

That statement is inaccurate.

Castro, speaking of the best and most profitable use of these tracts as of November, 1940, said, "For truck gardening purposes the land is worth $33.58 per acre per annum—the average rental per annum is $33.58 per acre" (R 159). Speaking of the Gore lot, after stating his opinion of its market value in November, 1940, to be $79,311.75 (R 160), he said, "In the first place that parcel of land as a whole * * * commands an average rental value per annum, that is, the average rental value covering the whole of $51.57" (R 160, 161). That rental value capitalized at 4% would show a market value of the tract as of November, 1940, of $79,311.75, and the willing buyer would have made a good investment at that figure (R 163). Speaking of the 192 acre tract as of November, 1940, the witness said "The value based on the earning capacity of the land and based on general conditions and various other conditions, such as the proximity to the center of the city, the fact that that is a portion of a region of land which in my opinion is one of the best future available areas for the expansion of this city, was worth $227,572.50, based on an average value of $1179.40 per acre, and this value per acre is based on the average rental value of that land of $47.176 per acre" (R 167). Asked for his opinion as to the market value of the 77 acre tract in November, 1940, the witness said that the average rental value per acre per annum was $41.25, which capitalized at 4% would show a value of $79,715.43 (R 169).

Castro's testimony was not as to what the land might be worth in the future, but as to what it was worth in November, 1940, in view of the future.

Mr. Russell considered that an investment in real estate which would yield an income of 4% on the purchase price would be a good investment (R 319). He gave his opinion of the market value of each of the three tracts as of November, 1940 (R 313, 314, 321, 325, 332). His opinion was based on the experience the Damon Estate had had in putting previous subdivisions on the market for lease (R 316, 317, 318), and on the existing demand for such lots (R 318, 326, 339, 342), and he estimated the value of the tracts on their rent-producing capacity as of November, 1940 (R 314).

That is to say, the rent-producing capacity of the land for a better and more profitable use than cane cultivation inhered in the land at that time.

On cross-examination, Mr. Russell was questioned concerning the number of lots into which the tracts might be subdivided (R 345, 353), and he stated that his opinion as to value in November, 1940, was based on rental value capitalized at 4% (R 351).

The market value testified to by Castro and Russell was not fixed present value obtained by capitalizing at four per cent the net income which in their judgment would be obtained if all the lands were leased after they were subdivided, as petitioner contends, but was based upon the rental value as of November, 1940, having in mind the potential better use of the land upon the expiration of the existing lease.

Petitioner on pages 17 and 18 of its brief says Russell spoke of the "hundreds of thousands of dollars which would have to be spent for the development of roads, streets and sewers" in the subdivision of the lands condemned.

This is inaccurate, and so indeed is the whole impression sought to be conveyed that the subdivision of 40 acres of the condemned lands into residence and housing areas, and the balance into small farms, would involve great expenditures.

The quotation from Russell's testimony was his statement with reference, not to the lands condemned, but to subdivision plans for other areas belonging to the Damon Estate, and was given as his reason why they probably would not be subdivided for a long time (R 351-2)

The evidence showed generally, that the cost of subdivision would be moderate (R 199, 244).

Under Hawaiian Practice the Evidence Offered by the Owners Was Admissible.

The land here is located in Hawaii. The trial was in the United States District Court for that territory. The practice and procedure in this case were therefore those applicable in condemnation proceedings in the courts of record of that territory. *United States Code,* Title 40, Sec. 258, provides:

> "The practice, pleadings, forms and modes of proceedings in causes arising under the provisions of section 257 [these proceedings were taken under section 257. R 10, 41] of this title shall con-

form, as near as may be, to the practice, pleadings, forms and proceedings existing at the time in like causes in the courts of record of the State within which such district court is held, any rule of the court to the contrary notwithstanding."

This statute, although in terms limited to states, has been held applicable to the United States District Court for Hawaii. *United States v. Honolulu Plantation Co.*, 122 Fed. 581, at 586-587 (C.C.A. 9th).

While we do not find any condemnation cases involving this point in the Hawaiian Reports, there are numerous cases involving valuations for taxation, which establish that the Hawaii practice not only permits the introduction of evidence of rental values, and their capitalization, as proof of market value, but deems such evidence persuasive.

The principles governing the ascertainment of value for the purposes of taxation are the same as those that control in condemnation cases and generally in controversies involving the ascertainment of just compensation (*Great Northern Ry. v. Weeks*, 297 U.S. 135, 139).

In re Taxes of Bishop Estate, 27 Hawaii 190, involved a tax assessment on land leased in subdivisions or lots. Witnesses testified that if the tract were sold in lots "some lots might bring fifty cents per square foot but not all lots could be sold at the present time." The court commented on this evidence as follows: "Such evidence as this coming from experts familiar with real estate values is always admissible in cases

of this kind" (p. 195). The court also approved the principle of arriving at value by capitalizing estimated rentals which could be secured on new leases if the old leases had expired on the assessment date.

In re Assessment of Taxes, Estate of Carniot, 13 Hawaii 688, the court said, "In this instance we think that the rent which the land yields or is capable of yielding is a safer guide as to its value than the terms and assessments of neighboring property."

In *Tax Assessment Appeals,* 11 Hawaii 235, 237, the court declared that "Intending purchasers consider chiefly the earning power of the property in the long run as shown by its past history and future prospects and possibilities."

See, also, *Assessment of Taxes, Estate of Bishop,* 13 Hawaii 671; *Assessment of Taxes of Kapiolani Estate,* 21 Hawaii 667; *In re Taxes Hawaii Commercial & Sugar Co.,* 26 Hawaii 708; *In re Taxes Waialua Agricultural Co., Ltd.,* 30 Hawaii 755; *In re Taxes Ewa Plantation Company, Ltd.,* 30 Hawaii 775; *Re Taxes Onomea Sugar Company,* 31 Hawaii 769.

While the latter three cases involved the valuation of a going business by the capitalization of profits method, we do not cite them on the basis that what the owners were proving here was the value of a going subdivision. They are cited merely to show that in Hawaii, the ascertainment of market value by the capitalization of current returns is an accepted and approved procedure.

An examination of the authorities in eminent domain reveals that practice and procedure, particularly with respect to the admission of evidence, varies greatly in the various jurisdictions, and indeed almost every case "stands on its own bottom" because the facts involved vary so greatly.

This Court in *Waialua Agricultural Co. v. Christian*, 305 U.S. 91, stated (p. 109): "Unless there is a clear departure from ordinary legal principles, the preference of a federal court as to the correct rule in general or local law should not be imposed upon Hawaii." This attitude toward matters of substantive law seems even more apposite when relating to matters of procedure, as to which Congress has determined that local practice is to be followed in condemnation cases.

No Prejudicial Error Occurred at the Trial.

We submit we have demonstrated that the trial court committed no error. We submit, further, that if perchance any of its rulings on evidence were erroneous, it was not prejudicial error within the terms of Section 269 of the Judicial Code as amended (28 U.S.C., Sec. 391),[1] in the light of the following:

1. The jury viewed the premises, and its verdict was reasonable. The values given by the various witnesses, and the jury's verdicts, are as follows:

---

1. "On the hearing of any appeal, certiorari, or motion for a new trial, in any case, civil or criminal, the court shall give judgment after an examination of the entire record before the court, without regard to technical errors, defects, or exceptions which do not affect the substantial rights of the parties."

Source	Value
Government	$137,487.00
Harrison and Kearns	309,279.78
Castro	386,599.68
Russell	514,345.17
Verdicts	265,404.80

The judgments were substantially lower than the lowest appraisal of the owners' experts, and were approximately half owner Russell's appraisal.

2. The instructions to the jury were clear and comprehensive and correctly stated the law. See 5 *C. J. S.* 1034, and cases cited; *Stricker v. Scott,* 283 Mass. 12, 186 N.E. 45, 46; *Prevette v. United States,* 68 F.2d 112 (C.C.A. 4th).

These instructions (R 422) followed *Olson v. United States* (supra) as found by the Court below (R 461). They were clear on the point that future or speculative profits were not to be considered (R 427) and the judgment was to be for the then market value of the lands. The value instruction was repeated to the jury (R 436).

3. The evidence complained of was brought out on cross-examination by the Government, and therefore the Government cannot complain. *Fidelity Co. v. Griner,* 44 F.2d 706, 709; *General Tire Co. v. Brown Co.,* 46 Ga. App. 548, 168 S.E. 75, 78.

4. The Government itself introduced evidence of the character which it claims was inadmissible, i. e., profit margins, rate of capitalization, cost of improvements, sales and leases of other property, etc., and also

permitted witnesses to testify on the same matter without objection. *Morrow v. Downing,* 210 Iowa 1195, 232 N.W. 483; *Bond Bros. v. Kay,* 223 Ala. 431, 136 So. 817, 818; *Fidelity & Deposit Co. of Md. v. Bates,* 76 F.2d 160, 169 (C.C.A. 8); 5 *C. J. S.* 973-4.

Error in the admission of evidence offered by one party is cured by the act of the adverse party in offering the same evidence or bringing it out on cross-examination. *Smaha v. George,* 24 S.E.2d 385, 392 (Ga.); *Morris Plan Co. v. Universal Credit Co.,* 168 S.W.2d 136 (Mo. App.); 5 *C. J. S.* 974-977, and cases cited.

5. The Government's motions to strike the witnesses' testimony were properly refused, even if their valuation testimony was properly subject to a motion to strike (which was not the case), for the witnesses had given other testimony which was clearly admissible, and the motions were to strike all the testimony. *United States v. Becktold Co.* (C.C.A. 8), 129 F.2d 473, 480; *Koopman v. Farmers' Mut. Hail Ins. Assn.,* 209 Iowa 958, 229 N.W. 221, 223; *Perazzo v. Ortega,* 29 Ariz. 334, 241 Pac. 518; *Massor v. Yates,* 137 Ore. 569, 3 P.2d 784; *Varner's Exrs. v. White,* 149 Va. 177, 140 S.E. 128.

6. Matter brought out on cross-examination of expert witnesses, reflecting on the validity of their conclusions, goes only to its weight and is not grounds for striking out such testimony. *Ramming Co. v. United States* (C.C.A. 8), 122 F.2d 892, 894-895; *City of Stockton v. Ellingwood,* 96 Cal. App. 708, 275 Pac. 228, 234; *City of Los Angeles v. Deacon,* 119 Cal.

App. 491, 7 P.2d 378, 379; *Neddermeyer v. Crawford County,* 190 Iowa 883, 175 N.W. 339, 342.

7. The Government's motions for directed verdicts were properly refused, even if all of the owners' valuation testimony was subject to being stricken, for the jury is not bound by expert testimony and in addition it viewed the premises. *The Conqueror,* 166 U.S. 110, 132; *Whaley v. Sloss-Sheffield Steel Co.,* 164 Ala. 216, 51 So. 419, 421, 424; *Washburn v. Milw. & L. W. R. Co.,* 59 Wis. 364, 368, 18 N.W. 328, 330; 32 *C. J. S.* 405, Sec. 569.

8. The basis of the witnesses' valuations was laid bare to the jury. The rates of capitalization were given to the jury and it was free to use any rate it thought proper. Furthermore, the Government introduced evidence as to the proper rate. Error in admitting the conclusion of an expert witness may be deemed harmless where the conclusion given is a mere matter of computation, comparison or a mere estimate. 5 *C. J. S.* 995 and cases cited.

In *Welsh v. Tennessee Valley Authority,* 108 F.2d 95, 102 (C.C.A. 6), the court said:

> "The triers of the facts who saw and heard the witnesses were the best judges of the value, weight and credibility of their testimony and could best weigh the evidence."

In *Union Electric Light & Power Co. v. Snyder,* (C.C.A. 8), 65 F.(2d) 297, the court pointed out:

> "The admission of evidence touching the value of property appropriated in condemnation cases

must be left largely to the discretion of the trial judge."

In the *Model Code of Evidence,* as adopted and promulgated by the American Law Institute, May 15, 1942, it is said, respecting opinion testimony (p. 201):

> "The judge at the trial is in so much better position than an appellate court to determine whether a witness should be permitted to give opinion evidence that his rulings should be accepted save in the most exceptional circumstances."

The general rule is stated in 5 *C. J. S.* 996, as follows:

> "Error in admitting opinion evidence may be regarded as harmless where the objecting party has an opportunity to cross-examine the witness and to show the real value of his testimony. * * * Error in the admission of opinion evidence may be regarded as harmless where the opinion relates to the amount of damages recoverable, and the verdict is for a much less sum than the witness testified should be allowed, where the verdict is not excessive, or where the jury might properly have rendered a verdict for a greater amount."

SPECIFIED ERROR 2.

Petitioner asserts that the Circuit Court of Appeals erred (Pet. Br. p. 8):

> "2. In holding that elements of value arising from a landowners monopoly of undeveloped land may be included in the just compensation awarded upon condemnation of a small part of that land."

An examination of the opinion of the Court below fails to reveal any such holding (R 457).

That Court, in its recital of facts, points out that the Damon Estate owns other lands in the vicinity, and that its witnesses were asked if the opening of such lands in competition with the condemned lands, would affect their value; that one of the witnesses stated that this would have no effect, but the other witnesses stated that their valuations were based on the assumption that such remaining lands would not be thrown open in competition—this either because the Trustees so stated, or because it was assumed that the Trustees, as a matter of business policy, would not put subdivisions on the market faster than they could be disposed of (R 460).

Evidently petitioner's contention is that in some way not clear to us, error was committed because some (not all) of the owners' witnesses fixed their values on the assumption that the Damon Estate would not throw its remaining lands on the market in the near future.

How this would constitute error on the part of the Court below is not apparent. In the trial court the Government made no motion to strike the testimony of the witnesses on this ground (R 418). All of such testimony was elicited on cross-examination by Government counsel, and could have no greater effect than to discredit the testimony of such witnesses. It went to the weight of such testimony and not to its admissibility.

How much it might detract from such testimony was a question for the jury. It might not discredit it at all—for a willing buyer contemplating the purchase of these lands would take into consideration whether or not there were likely to be competitive subdivisions in the vicinity, either by the Damon Estate or others, and his opinion as to whether such was likely, would be based on the very considerations that the witnesses testified to—i. e., the past actions of the Damon Trustees, their statements as to future policy, and the business disadvantage of putting more subdivisions on the market than the market could absorb.

In any event the jury was the judge of the matter, and it was not misled, for the judge instructed (R 428):

> "In this case it is admitted without dispute in the testimony that the lands condemned are a part of a holding in the immediate vicinity, owned by the same respondents. In deciding this case, you are not to assume any particular type or policy or management on the part of the trustees with respect to the remainder of said lands. The very theory and hypothesis upon which this case is being tried is the assumption of a free and open market, of a willing purchaser and a willing buyer in a free transaction. In considering this case, therefore, you are not bound to assume that the Trustees of the Damon Estate would not release any of the lands in the immediate vicinity from their present status."

This instruction covered in substance the Government's requested instructions 8 and 9 (R 84).

Finally, it is difficult to see how the Government could be prejudiced, for it contended and introduced evidence to prove, that there were large areas of other land not belonging to the Damon Estate in the vicinity equally available and desirable for subdivision purposes, and introduced an exhibit (Ex. G) to show the location and extent of such lands (R 399, 401).

SPECIFIED ERROR 3.

Petitioner asserts that the Circuit Court of Appeals erred (Pet. Br. p. 8):

> "In holding that enhancement of value due to the project for which the lands were taken may be included in the compensation paid for such lands."

We submit that an examination of the opinion of the Court below shows that it did no such thing (R 457).

The Government at the trial made no claim and introduced no evidence to show that the condemned lands were part of a Government project, undertaken at an earlier date. This claim was only asserted after the Court below had affirmed the judgments of the trial court, and the only facts advanced in its support are quotations from testimony before a Congressional Committee printed as an appendix to petitioner's brief.

At the trial the Government did not assert, as it does here, that the passage of the appropriation act

of May 25, 1939, not only appropriated funds for a "vast extension" of Pearl Harbor Navy Yard, but also funds "to acquire the specific lands condemned in this case" (Pet. Br. p. 33). On the contrary, the Government introduced evidence, and made an offer of proof, to show that proximity of the lands to the military establishment actually decreased their value because of the likelihood of their being declared out of bounds by military authorities (R 350, 394-6) and there were other large areas equally available and desirable (394-7, Ex. G).

In addition no factual basis appears to exist for petitioner's claim that the Appropriation Act of May 25, 1939, not only appropriated funds for a vast extension of Pearl Harbor Navy Yard, but also funds "to acquire the specific lands condemned in this case" —for:

1. Two suits are involved here. One (No. 434) does not involve Navy housing at all, but was prosecuted in behalf of the Public Works Agency as recited in the petition (R 11), "for army housing" as stated by Government counsel (R 105). It recites (R 10) that the funds for the condemnation were appropriated by the Act of September 9, 1940 (Public No. 849—76th Congress), only two months before the suit was filed and not May 25, 1939, as petitioner suggests.

2. The second suit (No. 436) is for Navy housing and recites that it is brought pursuant to acts of Congress approved June 28, 1940 (54 Stat. 676), and September 9, 1940 (54 Stat. 717). The latter is an appropriation act and appropriated funds for naval

housing. No mention is made in the petition of the Act of May 25, 1939, which petitioner says is the act appropriating the funds for this condemnation (R 40).

3. The hearings recited in the appendix of petitioner's brief do not support the statement that it was these lands that Admiral Morreel referred to, or that the appropriation was required to take care of expansion of the Navy Yard authorized by the appropriation, for he testified "the lands belong to several estates" and "an area of 244 acres is classed as cane land, 48 acres are classed as pasture land, 72 acres as fish ponds and waste lands, and approximately 1½ acres are classed as semi-commercial lands" (a total of 365½ acres). The lands in these suits (totaling 332 acres) all belong to the Damon Estate and all were in cane (except 2¼ acres leased to the bank), and at the trial the Government introduced evidence to show that extensive areas, besides the Damon Estate lands were equally available and desirable, including McGrew, McCandless and Bishop Estate lands (R 399-401).

Moreover, Admiral Morreel testified (April 5, 1939) that lands were required "to meet the immediate needs to relieve the *present* acute housing situation", that the housing was intended for civilian employees and that there had not been an expansion of civilian personnel at the Navy Yard recently, thus showing that the demand was in existence at the time the bill was under consideration and was not based on a need to be created by the works contemplated in the ap-

propriation bill. (All quotations are from the appendix to petitioner's brief pp. 37-39).

Pearl Harbor Navy Yard has been in existence since 1901 when the area was acquired by the Government by eminent domain (Sec. 1 *Estees Reports* (U.S.D.C. Hawaii) 141 and *U. S. v. Honolulu Plantation Company,* 122 Fed. 581). Hickam Field was established in 1933 (R 286). The lands here were condemned in November, 1940, to provide housing for personnel presumably working in these establishments. The acquisitions do not constitute enlargements of the military reservations, and certainly do not cover lands which were included in the public project from the beginning within the meaning of *United States v. Miller,* 317 U.S. 369, where the court states the principle thus (p. 376):

> "If a distinct tract is condemned, in whole or in part, other lands in the neighborhood may increase in market value due to the proximity of the public improvement erected on the land taken. Should the Government, at a later date, determine to take these other lands, it must pay their market value as enhanced by this factor of proximity. If, however, the public project from the beginning included the taking of certain tracts but only one of them is taken in the first instance, the owner of the other tracts should not be allowed an increased value for his lands which are ultimately to be taken any more than the owner of the tract first condemned is entitled to be allowed an increased market value because adjacent lands not immediately taken increased in value due to the projected improvement.

The question then is whether the respondents' lands were probably within the scope of the project from the time the Government was committed to it. If they were not, but were merely adjacent lands, the subsequent enlargement of the project to include them ought not to deprive the respondents of the value added in the meantime by the proximity of the improvement. If, on the other hand, they were, the Government ought not to pay any increase in value arising from the known fact that the lands probably would be condemned. The owners ought not to gain by speculating on probable increase in value due to the Government's activities."

We submit that the *Miller* case states no new principle of law, and if in fact these lands were included in "the public project from the beginning" it was the duty of Government counsel at the trial to assert and prove that fact, and to bring out evidence measuring the extent of the appreciation, if any, resulting from the fact such lands not immediately taken, increased in value due to the projected improvement. Government counsel made no such contention. On the contrary (1) he contended that there was no enhancement due to proximity to the Government establishments (R 350, 394); (2) he stipulated at the beginning of the trial that the values to be fixed were those prevailing on November, 1940, when the suits were filed (R 113); (3) he asked the Government witnesses for values as of November, 1940, in the same form as the questions later asked in behalf of the owners (R 117) and (4) he made no objection to the form of the

valuation question asked by the owners. Therefore, it must be assumed, that the Government at the trial, did not believe that any factual basis existed for the claim now being asserted by petitioner.

But even if there had been a factual basis for the claim, no error has been shown to have been committed by either the trial court or the Court below. No objection was made to any testimony on the ground now urged by petitioner. The valuation questions were properly directed to values at the date of the filing of the suits. As pointed out in the *Miller* case, the proper procedure is for the Government, if it claims the value as of the date of taking has been enhanced by the project itself, to bring that fact out on cross-examination (*United States v. Miller*, 317 U.S. 369 at 380). It certainly is not the duty of the landowner to affirmatively prove the non-existence of an appreciation in value, which he contends does not exist.

We submit, aside from the fact that the point is not available to petitioner here, because not raised in the trial court or the Court below, that no factual basis for the claim has been shown, and beyond that, no error is shown to have been committed by either court.

CONCLUSION

We submit that no error has been shown on the part of the Court below, which correctly stated and applied the law. We submit further, that no error has been shown on the part of the trial court, but on the contrary the trial was fairly conducted, the issue of value was thoroughly explored, the jury was correctly instructed, and the verdicts were reasonable.

December 27, 1943.

Respectfully submitted,

HERMAN PHLEGER,
A. G. M. ROBERTSON,
Counsel for Respondents.

J. C. PEPPIN,
ROBERTSON & CASTLE,
BROBECK, PHLEGER & HARRISON,
Of Counsel.